SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1902.

No. 316.

TOLTEC RANCH COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE COOK, S. N. COOK, ALFRED WARD, GEORGE WARD, G. J. WELLS, C. F. WELLS, JOSEPH DUDLEY and CHARLES DUDLEY, DEFENDANTS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal by the plaintiff in error from the decision of the Supreme Court of the State of Utah affirming the judgment of the District Court of Box Elder County of said State, and from the judgment of said District Court.

The suit was commenced on February 1, 1901, in said District Court, and is an action in the usual form under the statute of said State brought by the plaintiff (transcript, p. 1) against the defendants to quiet the title of plaintiff to certain lands situate in said County of Box Elder and State of Utah, described as follows:

The S. E. ¼ of the S. E. ¼ of Sec. 27, Township Eight (8) North, Range Two (2) West, Salt Lake Meridian, U. S. Survey.

After the overruling by the trial Court of the demurrers filed by them, the defendants answered the complaint, denying the material allegations thereof (trans. 2-14) and affirmatively pleading the statutes of limitations of said State, each of said defendants claiming to own a certain distinct portion of the land described in the complaint.

Upon the trial of said cause in said District Court, the plaintiff rested its case upon the following stipulation, made in open Court:

"IT IS STIPULATED that the plaintiff in this case is the grantee through mesne conveyances from the Central Pacific Railroad Company of the lands set out and described in plaintiff's complaint, and that a patent of the United States Government was duly issued and delivered to the said Central Pacific Railroad Company (trans. 29) bearing date January 20, 1900, conveying the said lands described in the complaint with other lands; that the Central Pacific Railroad Company, grantors, by deed dated October 17, 1895, conveyed said lands to D. P. Tarpey, and that D. P. Tarpey and wife, grantors, conveyed said land by deed to M. F. Tarpey, bearing date December 8, 1895; and that M. F. Tarpey and wife, grantors, conveyed the said land to the plaintiff in this action by deed dated October 17, 1896.—Copies of said patent and deeds are attached hereto and marked 'Plaintiff's Exhibits 'A,' 'B,' 'C' and 'D,' respectively."

On behalf of the defendants it was stipulated as follows:

"IT IS HEREBY STIPULATED that the map of definite location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior on the 20th day of October, 1868; that the land described in the complaint is within the ten-mile limit of the grant to the Central Pacific Railroad Company."

The defendants were permitted by the trial Court, over the objection of the plaintiff, to introduce testimony tending to show that the several defendants had used, held, occupied and claimed the several pieces of land described in their answers, of which they claimed the title and ownership (trans. 29-38) under and by virtue of the statute of limitations, as provided in Volume 2 of the Compiled Laws of 1888, at page 220, et seq., of the Territory of Utah, and of the Revised Statutes of the State of Utah, 1898, page 634, et seq.

Said cause was submitted by the trial Court to the jury, which returned verdicts in favor of each of said defendants, upon which judgments were entered, and upon appeal to the Supreme Court of said State, the judgment of the lower Court was affirmed (trans. 60-61).

The contention of the plaintiff in error is that the judgment of the trial Court and the decision of the appellate Court is against law, and upon suing out of the writ of error to this Court the plaintiff in error made its assignment of errors as follows:

(1). The Court erred in affirming the judgment of the trial Court.

(2.) The Court erred in holding that such title passed to the Central Pacific Railroad Company of California from the United States of America under the Acts of July 1, 1862, and July 2, 1864, said Acts being found and printed in Volume 12 of the United States Statutes, pages 289 and following, and Volume 13 of the United States Statutes, on page 356 and following, respectively; that the said defendants could and had acquired title thereto against the plaintiff and its predecessors in interest by adverse possession (trans. 64-65) under the statute of limitations of the Territory and State of Utah, said statute of limitations being found and printed in Volume 2 of the Compiled Laws of 1888 of the Territory of Utah, at page 220 and following, and found and printed in the Revised Statutes of the State of Utah, at page 634 and following, respectively.

(3). The Court erred in holding and deciding that the said defendants could and had acquired title to the said lands in dispute by adverse possession under the said statute of limitations, by an adverse holding of said lands prior to the 20th day of January, 1900, the date of the patent to the Central Pacific Railroad Company from the United States.

(4). The Court erred in holding and deciding that the said defendants could and had acquired title to said lands by adverse possession under the said statute of limitations, without proof of the date of the survey of the lands in dispute by the United States.

ARGUMENT.

The Supreme Court of the State of Utah, in reaching its conclusion that the bar of the statute of limitations of the State of Utah constituted a defense to the action of plaintiff, rely upon the following cases of this Court:

Deseret Salt Company vs. Tarpey, 142 U. S. 241.

Tarpey vs. Madsen, 178 U. S. 215.

(trans. 78-79).

And under the authority of these cases held that the statute of limitations ran in favor of the defendants, as well before as after the issuance of the patent to the railroad company.

And as shown by the record, unless this were true the defendants must fail.

Under the provisions of the statutes of the Territory and State of Utah, there must be an adverse holding of lands for at least a period of seven years by the defendants, before its provisions can be invoked.

Compiled Laws of Utah, 1888, Vol. 2, Page 220.

Revised Statutes of Utah, 1898, Page 634.

This action was commenced in the year 1901, the patent of the Government was issued to the railroad company January 20, 1900.

It is undoubtedly the law that the statute of limitations has no application and cannot be invoked in favor of a party claiming title thereunder, so long as the legal title remains in the Government.

Gibson vs. Chouteau, 13 Wall. 92.

Redfield vs. Parks, 132 U. S. 239.

The contention of the plaintiff in error is that it does not follow, as held by the Supreme Court of the State of Utah, because the railroad company may have acquired the legal title by virtue of the grant of congress, that the statute of limitations runs, or that title may be acquired by adverse possession prior to the issuance of patent, and this contention is made, notwithstanding the decision of this Court in the case of Langdeau vs. Hanes, 21 Wall. 521, because of the exception stated in the opinion in this case.

Certain conditions in the grants of Congress to the Pacific Railroads have since been recognized, and certain exceptions contained in said grants have been given effect by the decisions of this Court, which may be said to limit the broad scope which might be

inferred from the language used in the case of Salt Company vs. Tarpey.

Ankeny vs. Clark, 148 U. S. 345.

Barden vs. Northern Pacific R. R. Co., 154 U. S. 288.

Nelson vs. N. P. R'y Co.

(decided by this Court January 26, 1903).

Reverting to the case of Langdeau vs. Hanes (supra), Mr. Justice Field said: "If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

In the case of Ankeny vs. Clark this Court, quoting from Salt Company vs. Tarpey, says:

"In the case of Deseret Salt Company vs. Tarpey the Court, per Mr. Justice Field, regarding the failure or omission to pay the survey charges as operative to 'preserve to the Government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment' and thus to give the Government a lien for said costs."

And adds: "We therefore conclude that Ankeny, the defendant below, if he held only a title derived from the Northern Pacific Railroad Company, and if that company had not paid the costs of surveying and had not received a patent, did not hold such a title as it was obligatory on the plaintiff to accept."

In the case of Barden vs. N. P. R. R. Co., (supra), this Court held, in substance, that even after the performance of all the conditions subsequent by the railroad company, as contemplated by the grant, the discovery of mineral *before patent had actually issued, would defeat the railroad company's title.* It therefore follows that until patent actually issues, the railroad companies or their grantees have not such a title as should set the statute of limitations in motion.

In the case at bar, the only evidence in the record showing that the land in dispute was not within any of the exceptions contained in the grant, and a compliance with the conditions precedent to the issuance of the patent, is the patent itself.

As stated in the case of Langdeau vs. Hanes (supra), "a segregation by survey will be required."

Except as recited in the patent, there is no evidence showing when the land was surveyed and ascertained to be an odd-numbered section, as contemplated by the grant, nor when the Government lien was discharged by the selection of same by the railroad company, and the payment of the fees for surveying, selecting and conveying same, nor, except as appears in the patent, no proof to show the railroad had ever been built at all.

In addition to the recitals in the patent, it is stipulated in the record that the map of definite location of the Central Pacific Railroad Company was filed in the office of the Secretary of the Interior, on the 20th day of October, 1868, and that the land described in the complaint is within the ten-mile limit of the grant to the Central Pacific Railroad Company.

The record fails to show when this land was surveyed, when selected by the railroad company, or when the fees were paid. That all these things were done is proved, of course, by the issuance of the patent, but there can be no presumption as to the time, unless it might be said to be upon the date of the patent itself.

If it is true that no presumption will be indulged as to the time of the selection of the lands by the railroad company, or of the date of its survey by the Government, or the time of the payment of the fees required by law, and if these things, or either of them, are required to be done before the statute of limitations would begin to run, it follows that the defendants have not acquired any title by their alleged adverse holding, and the judgment should be reversed.

Respectfully submitted,

T. D. JOHNSON,
Attorney for Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 42.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Additional Brief in Behalf of Plaintiff in Error.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
T. D. JOHNSON,
Of Counsel for Plaintiff in Error.

C. H. Reynolds, Printer and Binder, Syracuse, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 48.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK, AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

ADDITIONAL BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement.

The land in controversy is within the place limits of the grant to the Central Pacific Railroad Company under the Act of Congress approved July 1, 1862 (Appendix, p. 1), and entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the Same for Postal, Military, and Other

Purposes" (12 U. S. Stat., 489) as amended by the Act of Congress approved July 2, 1864 (Appendix, p. xx) (13 U. S. Stat., 356), and the plaintiff in error is the grantee of the land in question through mesne conveyances from the Central Pacific Railroad Company (Record, p. 29). The Central Pacific Railroad Company filed its map of definite location in the office of the Secretary of the Interior on the 20th day of October, 1868 (Record, p. 29). It does not appear from the record that the land in dispute was ever surveyed or that the Railroad Company ever paid to the United States "the cost of surveying, selecting and conveying" the land in dispute, as required by the 21st section of the Act of 1864. A patent for this land, dated January 20, 1900, was duly issued by the United States and delivered to the Central Pacific Railroad Company (Record, p. 29).

In January, 1901, the plaintiff brought this action against the defendants to quiet its title to the land in dispute (Record, p. 1). The defendants in answer to the complaint alleged that they and their grantors and predecessors had claimed, possessed and owned the land described in the plaintiff's complaint for more than thirty years peaceably, continuously and adversely to

the plaintiff, and that they were now the owners and seized thereof, and that the plaintiff's cause of action was barred by the statute of limitations as provided by sections 2856–2872, inclusive, of the Revised Statutes of Utah (Record, p. 4).

The case was tried before a jury and the defendants were permitted, over the objection of the plaintiff, to introduce evidence tending to show that they were entitled to the land in question by reason of adverse possession (Record, p. 30). A verdict was returned in favor of the defendants upon which judgment was entered and an appeal taken to the Supreme Court of the State which affirmed the judgment below.

The case has been brought here by writ of error under the provisions of section 709 of the Revised Statutes of the United States, and the single question presented is whether a railroad can be deprived of land granted to it by the United States by reason of the adverse possession by a third party prior to the issuance of a patent for the land by the United States.

TOLTEC RANCH COMPANY AGAINST WILLIAM BABCOCK ET AL. NO. 49.

The facts in the Babcock case are substantially the same as in the preceding case upon the

docket against George Cook and others. The Babcock case is a consolidated action being an action of ejectment and an action in claim and delivery for certain crops, which were tried together. The question involved is identical with the question in No. 48, the preceding case, brought against George Cook and others, viz., whether the statute of limitations of a State begins to run against a grantee of the United States prior to the issuing of a patent for the land. The two cases will be argued together, and it seems unnecessary to make any further statement of the facts in the Babcock case.

Assignment of Errors.

The Supreme Court of the State of Utah erred:

I. In not reversing the judgment of the District Court of the First Judicial District, Box Elder County, State of Utah, entered herein on May 24, 1901, and directing the said Court to render a judgment in favor of the plaintiff.

II. In deciding that the defendants below were entitled to the land in dispute.

III. In holding and deciding that the defendants had acquired title to the land described in the complaint by adverse possession under the statutes of Utah.

IV. In not deciding that the legal title to the land described in the complaint remained in the United States until the patent therefor was issued by the United States to the Central Pacific Railroad Company on January 20, 1900.

V. In not deciding that the legal title to the land in controversy remained in the United States (notwithstanding the filing of its map of definite location by the Railroad Company) until the payment by the Railroad Company of "the cost of surveying, selecting and conveying" the land as required by Section 21 of the Act of 1864, and that in default of any evidence that this payment was ever made the title to the land remained in the United States until the patent was issued.

VI. In not holding and deciding that the defendants could not acquire any title to the land in question by adverse possession while the legal title thereto was in the United States.

VII. In not holding and deciding that the defendants could not acquire any title to the land by adverse possession against the plaintiff except by adverse possession after the grantor of the plaintiff had received the patent therefor from the United States.

FIRST POINT.

The legal title to the land in dispute remained in the United States until the patent therefor issued, and the statute of limitations did not commence to run against the plaintiff in error and its grantors until the patent for the land had been obtained from the United States.

It will no doubt be conceded that no title by adverse possession can be obtained as against the United States. It will probably also be conceded by counsel for the defendants in error that if the legal title to the land remained in the United States until the patent therefor was issued, then the judgment below must be reversed. At all events, the Court below in the course of its opinion (Record, p. 78) says:

> "But counsel for the appellant insist that the statute of limitations could only begin to run from the issuance of patent and that therefore the defense of adverse possession must fail. *This position would be sound if the legal title to the land had remained in the United States until the patent was issued, but such was not the case.*"

The single and important question, therefore, which presents itself upon this record is whether the legal title to the land remained in the government until the patent was issued. If it did, then the judgment below must be reversed. That it did would seem to be well established by the decisions of this Court.

The case of Redfield vs. Parks, 132 U. S., 239, was an action in the nature of an ejectment brought to recover the possession of certain real estate. The plaintiff had purchased the land in question at a judicial sale on a judgment against the Mississippi, Ouachita & Red River Railroad Company, and upon the trial the plaintiff relied upon and introduced in evidence a patent from the United States dated April 15, 1875, conveying the property to said Railroad Company. The defendants relied upon a deed made by the County Clerk of Lafayette County, Arkansas, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the general statute of limitations of Arkansas of seven years. The action was commenced on the 11th day of April, 1882, and therefore within seven years from the date of the patent from the United States. The com-

plaint was dismissed in the Court below, and the judgment below was reversed by this Court. At page 243 it was said by Mr. Justice MILLER, as follows:

> "It is apparent from the finding of the facts that the action, which was commenced on the 11th day of April, 1882, was within the seven years allowed by the statute from the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government, that no statute of limitation affects the rights of the government, unless there is an express provision to that effect in the statute, and even then it cannot be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the statute of limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United

States until the issuing of the patent to the railroad company.

"In the courts of the United States, where the distinction between actions at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action or at its trial is in some other party, the plaintiff cannot recover. The facts in the present case show that this title to the land in controversy was in the United States until the 15th day of April, 1875. *Up to that time the statute of limitations could not begin to run in bar of any action dependent on this title.* The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land office. His title, therefore, being derived from the United States, the right of action at law to oust the defendant did not commence until the making of that patent."

In the case of Gibson vs. Chouteau, 13 Wall., 92, the plaintiff brought ejectment to recover 64 acres of land in the county of St. Louis, Mo., and

claimed title to the land under a patent of the United States issued to his immediate grantor. It appeared upon the trial that the facts leading to the issuance of the patent were as follows:

In September, 1803, one O'Carroll settled by permission of the Spanish authorities on vacant lands in the district of New Madrid, in the territory of Louisiana. After the cession of Louisiana to the United States, O'Carroll claimed the land by virtue of his settlement and the claim was confirmed. In 1812, a large part of the land in the county of New Madrid was injured by earthquakes, including the land belonging to O'Carroll. In 1815, Congress passed an act for the relief of the parties who had suffered from the earthquakes aud authorized persons whose land had been materially injured to locate a like quantity of land on any of the public lands of Missouri.

In November, 1815, the recorder of land titles in St. Louis gave a certificate to the effect that the land of O'Carroll in New Madrid County had been injured by earthquakes, and stating that under the Act of Congress aforesaid, O'Carroll or his legal representatives were entitled to select a like quantity of land on any of

the public lands of the Territory of Missouri. In June, 1818, a location of land in the Territory of Missouri was made on behalf of one Christian Wilt who had become by mesne conveyances the owner of the interests of O'Carroll. From some unexplained cause, the survey and plat of this land was not returned to the recorder until August, 1841, when a patent certificate was issued to O'Carroll, or his legal representatives, and thereafter and in June, 1862, a patent was issued by the United States to Mary McRee, who had acquired by various mesne conveyances the interest of Wilt, and in August of the same year, she conveyed the land to the plaintiff.

Upon the trial, the defendants set up as a bar to the plaintiff's action that previous to the issue of the patent they had been in possession of the premises more than ten years, the period prescribed by the statute of Missouri within which actions for the recovery of real property must be brought. By the statutes of the State of Missouri, the action of ejectment will lie on certain equitable titles and could be maintained on a New Madrid location against any person not having a better title. The defendants therefore contended that

the statute of limitations which had run against the equitable title, created by the location of O'Carroll's claim, was also a bar to the action founded upon the legal title acquired by the patent of the United States. The trial court held that the patent from the United States having issued to Mrs. McRee within ten years next before the commencement of the suit, the possession of the defendants was not a bar to the plaintiff's recovery, and gave verdict and judgment accordingly for the plaintiff. The case was twice heard in the Supreme Court of the State, and upon the first hearing the Court affirmed the decision of the inferior court, holding that "until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent." On the second hearing in the Supreme Court of the State, the Court reversed the decision of the inferior court, and held that the statute of limitations did run against the plaintiff before the date of the patent issued by the United States.

This Court, however, reversed the decision of the Court below and affirmed the judgment of the trial court. Mr. Justice FIELD in writing

the opinion of the Court said, at page 100, as follows:

> "The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."
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> * * * * * *
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> "But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in

> their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted."

In the case of Bagnell vs. Broderick, 13 Peters, 436, the plaintiff brought an action of ejectment for a section of land in Missouri, claiming title thereto by virtue of a patent from the United States dated June 17, 1820. It was said at page 450, as follows:

> "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; *until it issues the fee is in the government;* by the patent, it passes to the grantee, and he is entitled to recover the possession in ejectment."

In the case of Lindsey vs. Miller's Lessee, 6 Peters, 666, the plaintiff brought an action of

ejectment in the United States Circuit Court for the District of Ohio, to recover possession of a tract of land lying in what is called the Virginia Military District. On the trial the plaintiff exhibited a patent for the land bearing date December 1, 1824, and the defendants requested the Court to instruct the jury that the uninterrupted possession of the land for more than 21 years, was a bar to the plaintiff's recovery. The trial court refused to give this instruction. The plaintiff recovered a judgment in the Court below and the judgment was affirmed by this Court which said at p. 673, as follows:

> "That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well settled principle, that the statute of limitations does not run against a State. If a contrary rule was sanctioned, it would only be necessary for intruders upon the public lands, to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly im-

practicable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government.

"The title under which the plaintiff in the ejectment claimed, emanated from the government in 1824. Until this time there was no title adverse to the claim of the defendants. There can, therefore, be no bar to the plaintiff's action."

In the case of Langdon vs. Sherwood, 124 U.S., 74, it was said at p. 85 as follows:

"If it (the patent) never issued, it is obvious that the legal title remains in the United States, and, according to the well-settled principles of the action of ejectment, the plaintiff cannot be entitled to recover in the action at law.

"To receive this evidence, and to give it the effect of proving a legal title in the holder of such a receipt, because the statute of the State proposes to give it such an effect, is to violate the principle asserted in Bagnell v. Broderick, that it is for the United States to fix the dignity and character of the evidences of title which issue from

> the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates."

It is to be noticed that the Court below decided this case without in any way referring to the prior decision of the Court in the case of Steele vs. Boley, 7 Utah, 64, where it was held that the statute of limitations of Utah did not run against a patentee of public land from the date of the final payment for the land, but from the date of the issuance of the patent therefor by the United States. This case reversed the former decisions of the Utah courts upon the authority of Redfield vs. Parks, 132 U. S. The Court in speaking of the former decisions of the Court which were overruled, said as follows:

> "An examination of those cases will disclose the fact that all, or nearly all of them, are based on statutes which provide that such a certificate is proof of title equivalent to a patent against all but the holder of an actual patent, and the holder, therefore, of

such a certificate might maintain ejectment in the State courts of those States against one who had taken wrongful possession of the land described in the certificate, and, if he neglected to do so, the statute would run against him, and in favor of the one in possession. But since the former decision in this court the Supreme Court of the United States has held that, while the title to public land is still in the United States, no adverse possession of it can, under a State statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States against the legal title under a patent from the United States. Redfield v. Parks, 132 U. S. 239. * * * The decisions of that court are of binding authority upon this Court, and, under the authority of *Redfield v. Parks*, *supra*, we must hold that the District Court erred in admitting evidence of adverse possession by defendants prior to the issuing of the patent to plaintiff, and, in instructing the jury to find for defendants if they found the defendants had held continuous, open, and adverse possession of the premises in controversy for seven years before this action was begun by plaintiff."

It is difficult to see what distinction can be

drawn between the case of Steele vs. Boley and the present controversy. The Steele case virtually held that no title by adverse possession could be gained until there had been an open and adverse possession for the requisite number of years after the patent had issued.

It is also important in this regard to notice the language of the fourth section of the Act granting the land in question to the Central Pacific Railroad Company. By this section it is provided that upon certificate of the Commissioners to the effect that forty consecutive miles of the railroad and telegraph line had been completed and equipped in all respects, then

> "*patents shall issue conveying the right and title to said land* to said Company on each side of the road so far as the same is completed to the amount aforesaid."

The statute just quoted provides that "patents shall issue conveying the right and *title*" to the land in question. Of course, if the legal title had already passed by the grant itself, there would be no legal title to be conveyed by the patent. The statute, however, as we understand it, means that by the Act and the filing of the map of definite location, the railroad company

acquired an equitable title to the land, the United States holding the legal title in trust until a patent should issue. In other words, Congress by the act declared that a patent was necessary to complete the title. As to this, it was said in Wilcox vs. Jackson, 13 Peters, 498, 516, that "the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. *Congress has declared, as we have said, by its legislation, that, in such a case as this, a patent is necessary to complete the title. But, in this case, no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed, but remains in the United States.*"

The defendants in error rely upon and insist that the authorities to which we refer have been overruled by the case of Deseret Salt Company vs. Tarpey, 142 U. S., 241. It is true that in this case it was held that the legal title to lands granted to the Central Pacific Railroad Company passed to the Company upon the filing of its map of definite location. Our answer to this case is:

First. That the doctrine there decided has

always been limited by this Court to the particular facts arising in that case, and that such facts are in no way similar to the facts in the case at bar, there being no question in the Tarpey case as to whether the Statute of Limitations of a State began to run against a grantee from the Government prior to the issue of a patent for the land. The point decided by the Tarpey case was simply that the Railroad Company had a sufficient interest by reason of the filing of its map of definite location, to enable it to bring an action of ejectment.

Second. That the Tarpey case apparently overruled the case of Railroad Company vs. Prescott, 16 Wall., 603, without once referring to the Prescott case in the decision, and that the principle decided in Railroad Company vs. Prescott has since the Tarpey case been reaffirmed by this Court in the case of Ankeny vs. Clark, 148 U. S., 345.

Third. That the case of Wisconsin Railroad Co. vs. Price County, 133 U. S., 496, relied upon by the Court in the Tarpey case does not hold that the legal title to the land there in question passed to the Railroad Company prior to a patent from the United States, as the Court was par-

ticular to hold in the Price County case that that question was not necessary for it to decide, saying at page 511, as follows:

> "The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government."

Fourth. While the court in the Tarpey case held that the legal title to the land granted to the Central Pacific Railroad Company passed to the railroad at the time of filing its map of definite location, yet, at the same time, it held that the land was still subject to the control of the United States. It is certainly difficult to understand how the legal title could have passed prior to the issuance of the patent, and yet that the land should remain subject to the control of the Government.

Although in a certain sense the title to the land in dispute may have passed to the railroad at the time of the filing of its map of definite location under the ruling in the Tarpey case (*supra*),

yet it was only a conditional fee, as is shown by the opinion of Mr. Justice FIELD, at page 252, where he says :

> "Whilst a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the act of Congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, *the lands could not be disposed of by the company without the consent of Congress*, except as each twenty-mile section of the road was completed and accepted by the President, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest, from different provisions of the act, that Congress intended to secure this application of them. *Whatever disposition might be made by the Company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control*

> *of Congress, either to compel their application for the construction of the road contemplated, or to enforce their forfeiture if the road was not completed as required by the act.* The application of the lands to the construction would not, of itself, operate to transfer the title; it would only remove the restriction upon the use and disposition of the title already possessed."

The only conclusion from these words is that while the railroad, by filing the map of definite location, obtained a legal title sufficient to enable it to bring an action of ejectment, yet it was a conditional title of such a character as (to use the words of Mr. Justice WHITE in Northern Pacific Railway v. Townsend, 190 U. S., 267) to be "inconsistent with the power in an individual to acquire, for private purposes, by limitation," any of the land granted until a patent therefor had issued from the government.

In other words, the title acquired by the railroad company at the time it filed its map of definite location was not a full legal title in fee simple absolute, but was a conditional title subject to being divested by the United States. To put it in another form, both the United States

and the railroad, after the filing of the map of definite location by the railroad company, held an interest in the land in dispute, and, as an individual cannot acquire a title by adverse possession to lands in which the United States has any interest, the character of the title was such, resulting from this joint interest, that an individual could not, at the time of filing the map of definite location, acquire the land for private purposes by limitation.

Fifth. That, as we understand it, the Tarpey case has been substantially overruled by the case of Ankeny vs. Clark, 148 U. S., 345, where it was held that,

> "A title derived from a land grant railroad company *which has not received a patent*, by reason of failure to pay the costs of surveying, is not a title which a party who has contracted for a deed of the land and has paid the purchase price therefor, is obliged to accept." (*Syllabus.*)

In other words, the railroad company by filing its map of definite location has not acquired a marketable title to the land or what is the same thing a legal title, but simply an equitable title which will become a legal title upon the issue of

a patent for the land by the United States or possibly upon the payment of the cost of surveying, etc.

Sixth. The case of Barden vs. Northern Pacific Railroad Co., 154 U. S. 288, if it does not overrule the case of the Deseret Salt Co. vs. Tarpey (*supra*) certainly limits the doctrine of that case to the particular circumstances then before the Court. The Barden case was an action of ejectment brought by the Northern Pacific Railroad Co. to recover the possession of lands granted to it by the United States under the act of Congress of July 2, 1864. The Railroad Company had filed its map of definite location July 6, 1882. Under the ruling, therefore, in the Tarpey case, the railroad company had the legal title to the land, and was entitled under its pleading to recover the same. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled in the court below, and leave given to the defendants to answer. This they declined to do, and decided to abide by the demurrer. The case was brought to this court by writ of error, and the judgment below reversed, and the case remanded to the

Circuit Court, with directions to sustain the demurrer of the defendants upon the ground that the mere allegation in the complaint that the land had been granted to it by the United States under the Act of Congress of July 2, 1864; that the map of definite location had been properly filed and a report to that effect made by the commissioners to the President of the United States, was not sufficient to make a *prima facie* case of a legal title in the plaintiff to the land in question.

It is not plain why the Barden case does not overrule the Tarpey case. Both were actions of ejectment. In the Tarpey case it was held by this Court that the Railroad Co. acquired the legal title to the land under the grant from the government at the time of filing its map of definite location at least for the purpose of bringing an action of ejectment. In the Barden case it was held that the filing of the map of definite location was not sufficient to enable the Railroad Co. to bring an action of ejectment to recover possession of lands granted to it by the United States. It is not clear how the two cases can be reconciled. In any event it would seem to have been the intention of the court by its decision in

the Barden case to limit the doctrine of the Tarpey case to the identical facts of that case.

In the case of Corrinne Co. vs. Johnson, 156 U. S., 574, the plaintiff brought an action to recover possession of real estate, claiming title thereto under the Central Pacific Railroad Company, it being contended that the lands were within the grant made by the Acts of Congress of 1862 and 1864, and that by reason of the admitted completion of the road, the title had passed to the railroad company. The trial Court in its instructions to the jury expressed the opinion that the plaintiff had failed to prove any title. The statement on motion for a new trial and appeal signed by the trial Judge did "*not contain any patent from the Government for the lands.*" The trial resulted in a verdict and judgment for the defendant, and in this Court the judgment was affirmed, Mr. Justice BREWER saying, at page 576 :

> "*Proof that the road had been located and completed* and that the tracts claimed were odd numbered sections within the twenty-mile limit, *was not sufficient to establish title in the company.* * * *
>
> "Now the defect in this record which is

> fatal to the case of the plaintiff in error is that nowhere is it shown that all the testimony received on the trial is preserved. Under such circumstances *we are not at liberty to assume that there was in evidence a patent, or other instrument of itself working a transfer of the legal title from the government to the railroad company.*"

As we understand this case, this Court held that the legal title did not pass from the United States to the Railroad Company simply by reason of the filing by the latter of its map of definite location. It would seem, therefore, that the Corrinne Company case held a contrary doctrine to that declared in the case of Deseret Salt Company vs. Tarpey (*supra*).

Counsel for the defendants in error also seem to rely with considerable confidence on the case of Langdeau vs. Hanes, 21 Wall., 521. If we understand correctly the facts in this case, it would seem to have no bearing whatever upon the question now before the Court. In the Langdeau case the State of Virginia, which, prior to the Revolution, had asserted title to the northwest territory had always respected the titles of the French and Canadian inhabitants, who had

declared themselves her citizens. When she ceded the northwest territory to the United States she stipulated by the express terms of her grant that the titles which these French and Canadians then had should be confirmed by the United States, and the United States in accepting the grant bound itself to perform the stipulation. In other words, any French or Canadian inhabitant of the northwest territory who had, prior to the cession by the State of Virginia to the United States, acquired the title to any of the land and had declared himself a citizen of the State of Virginia, was entitled to have such title confirmed by the United States. Of course in a controversy subsequently arising in an action of ejectment as to the title to land derived by mesne conveyances from the French and Canadian citizens of Virginia prior to the cession of the northwest territory, the defendant was entitled to claim that his adverse possession of the land did not begin to run from the date of the patent from the United States to the plaintiff, for the reason that the plaintiff did not obtain any title to the land from the United States at all, but had acquired his title to the land years before and prior to the cession of the northwest territory to

the United States, and that the patent from the United States issued subsequently to such cession was simply a patent confirming the previous title in accordance with the stipulation contained in the grant from the State of Virginia to the United States.

We, therefore, confidently submit that the Langdeau case is no authority here, and that the questions in the case at bar were not in any way there considered by this Court. This is clear from the statement in the opinion at page 531, where it was said:

> "The plaintiff can therefore derive no aid from the patent issued in 1872. The doctrine which his counsel invokes that the legislation of a State cannot defeat or impair the rights conferred by a patent of the United States in advance of its issue *is sound when properly applied*, but it has no application here. * * * Here, in any view that may be taken the title was perfected in the heirs of Tongas more than half a century before the patent issued."

It is important to notice the provision in section 21 of the Act of Congress of July 2, 1864, which is as follows:

> "That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States, the cost of surveying, selecting and conveying the same by the said company or party in interest as the title shall be required by said company."

This section of the statute has been construed by this Court in the cases of Railway Co. vs. Prescott, 16 Wall., 603; Railway Co. vs. McShane, 22 Wall., 444; Northern Pacific Railroad vs. Traill County, 115 U. S., 600, and Ankeny vs. Clark, 148 U. S., 345; and it has invariably been held that a railroad company, notwithstanding the fact that it has filed its map of definite location, does not acquire a legal title to the land until the cost of surveying, selecting and conveying the same has been paid by the railroad company to the United States.

In the case of Ankeny vs. Clark (decided after the case of Deseret Salt Co. vs. Tarpey) the plaintiff sought to recover the consideration which he had paid to the defendant for certain land, upon the ground that the defendant did not have and was unable to convey to him a good

title thereto. The defendant in his answer claimed that his title which he had derived from the Northern Pacific Railroad Company was good, inasmuch as the legal title to the land had passed to the railroad company by reason of the filing by the company of its map of definite location, and that it was to be presumed that the cost of surveying, etc., had been paid by the railroad company to the United States. This Court, however, held that there was no such presumption, and in the absence of any averment in the pleadings or any stipulation to that effect, the defendant had no title to the land, saying at page 358, as follows:

> "Turning to the pleadings and to the stipulation as to the facts, we find that the defendant did not aver in his answer, nor was it admitted in the stipulation that the railroad company had complied with the necessary conditions as to payment of costs of survey, nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation only by the admission in the stipulation that the railroad company had

> filed its map of definite location and had constructed its road to the satisfaction of the President, we think that the court below was warranted in holding that the defendant's title was imperfect, and that there was no question of fact to submit to the jury."

An examination of the pleadings and of the stipulations in this case fails to disclose that the cost of surveying, selecting and conveying the lands involved in this suit has been paid by the railroad company to the United States. It is true that the patent for the land was issued January 20, 1900. Possibly the cost of surveying, etc., was paid before the patent was issued. If the cost of surveying was ever paid, it does not appear by the record when this was done and how long before the granting of the patent. It may have been a week before, it may have been at the very time of the issue of the patent, or it may not have been at all. In other words, under the four decisions of this Court to which we have just referred, the legal title of the plaintiff in error to the land in question was not acquired at least until the payment of the cost of surveying, etc. This date the defendant in error has failed to prove. The Statute

of Limitations of Utah certainly cannot begin to run against the plaintiff in error until it obtained the legal title to the land and the defendants in error, who claim title by adverse possession, must certainly prove the date of the acquiring of the legal title by the plaintiff in error before they can sustain their contention of title by adverse possession. The position of the plaintiff in error is that it acquired the legal title to the land upon the date of the patent from the Government. The claim of the defendants in error is that the plaintiff in error and its grantors acquired a legal title to the land when the railroad company filed its map of definite location. This Court has, however, held otherwise and has definitely determined that the legal title did not pass to the railroad until the cost of surveying, etc., was paid to the United States as required by the Act of 1864, and, if not paid, then of course not until the patent was issued. In absence of proof in the record that cost of surveying was paid, the inference is that it never was, and that title to the land remained in the United States until patent issued.

We therefore confidently submit that upon the four cases decided by this Court and last referred to by us, the plaintiff in error did not acquire

the legal title to the land in question prior to the payment by the railroad company of the cost of surveying, etc., the land in dispute. The date when this was done, if done at all, does not appear in the record. If done at all, it may have been at the time of the issuance of the patent. The defendants in error have not shown when the legal title to the land passed from the United States to its grantee prior to the patent (if at all) and have therefore failed to show that since the legal title passed out of the United States they have had possession of the land for the requisite number of years under the Utah law to bar the claim of the plaintiff in error.

If the Court should hold in the present case that the defendants in error had acquired a valid title to this land by adverse possession, the effect would be to take it from the railroad which had earned it and give it, not to a homestead settler, but to a squatter pure and simple. This Court has never yet held that the lands under the Pacific Railroad grants could be taken from the railroads by squatters. If it should do so now the result would be that "in this way the public domain would soon be appropriated by adven-

turers" (Lindsey vs. Miller's Lessee, 6 Pet., 666, 673).

To repeat briefly our position, we contend that the legal title to the land in dispute as far as the case at bar is concerned did not pass out of the United States at the time the Railroad Company filed its map of definite location, but remained in the United States until the patent therefor was issued for the following reasons:

First. That this Court has held that under the Pacific land grants the title to the land granted remained in the United States until the cost of survey had been paid (Railway Co. vs. Prescott, 16 Wall., 603; Railway Co. vs. McShane, 22 Wall., 444; Northern Pacific Railroad vs. Traill County, 115 U. S., 600; Ankeny vs. Clark, 148 U. S., 345) and that there is no evidence in the present case that the cost of survey has been paid, or that the land ever was surveyed.

Second. That this Court has held that the Railroad Company under a land grant acquired no legal title to the land simply by filing its map of definite location (Ankeny vs. Clark, 148 U. S., 345; Barden vs. Northern Pacific Railroad Co., 154 U. S., 288).

Third. That the 4th section of the Act of July, 1862, provides that "patents shall issue conveying the right and *title* to said land."

Fourth. That the right to assert adverse possession against the grantee of the government prior to the issue of a patent was not in anyway considered or decided in the case of Deseret Salt Co. vs Tarpey, 142 U. S., 241.

Fifth. That the title (if any) acquired by the Railroad Company at the time of filing its map of definite location was a conditional fee and of such a character that the defendants in error could not acquire the land by limitation, as the United States still had an interest therein.

SECOND POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
LINDSAY R. ROGERS,
T. D. JOHNSON,
Of Counsel for Plaintiff in Error.

APPENDIX

Act of Congress Approved July 1, 1862 (12 U. S. Stat., 489).

CHAP. CXX.—AN ACT to aid in the construction of a Rail Road and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes, approved July 1, 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled : That Walter S. Burgess, William P. Blodget, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island ; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut ; Isaac Sherman, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben. Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York ; Ephraim Marsh, Charles M. Harker, of New Jersey ; John Edgar Thompson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, Jr., of Pennsylvania ; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio ; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri ; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe,

Charles McLaughlin, Timothy Dame, John R. Robinson, of California ; John Atchinson and John D. Winters, of the Territory of Nevada ; John D. Campbell, R. N. Rice, Charles A. Trowbridge and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan ; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook, Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa ; William B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois ; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts ; Franklin Gorin, Laban J. Bradford and John T. Levis, of Kentucky ; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont ; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon ; William Bunn, Jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Broadhead, A. H. Virgin, of Wisconsin ; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana ; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland ; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota ; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire ; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas ; Gilbert C. Monell and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska ; John Evans, of Colorado ; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of " The Union Pacific Rail Road

Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out locate, construct, furnish, maintain, and enjoy a continuous rail road and telegraph, with the appurtenances, from a point on the one-hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Rail Road and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said Board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post office at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and St. Louis. Said board shall organize by the choice from its number of a president, secre-

tary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said Board of Commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said Board of Commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books, and other books in the possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease to determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders, two additional directors shall be appointed by the President of the the United States, who shall act with the body of directors, and to be denominated directors on the part of the Gov-

ernment; any vacancy happening in the Government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Rail Road Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of ai least five shares of stock in said company, except the two directors to be appointed by the President, as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations, as they shall deem needful and proper touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they shall deem necessary to complete the rail road and telegraph within the time in this act prescribed. Said president, vice-president and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said

corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said rail road and telegraph line ; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof ; said right of way is granted to said rail road to the extent of two hundred feet in width on each side of said rail road where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said rail road and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed ; *provided*, That all mineral lands shall be excepted from the operation of this act ; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three

years after the entire road shall have been completed' shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive mlles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first class rail road, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and to report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said rail road and telegraph line have been completed and equipped in all respects as required by this act, then upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said rail road and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury

shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the rail road and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, this section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said rail road and telegraph line in repair and use, and shall at all times transmit despatches over said tele-

graph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said rail road for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 7. *And be it further enacted*, That said Company shall file their assent to this act, under the seal of said Company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada Territory, before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said Company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named; *Provided*, That in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most prac-

ticable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

SEC. 8. *And be it further enacted*, That the line of said rail road and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the Territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Rail Road Company of California.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Rail Road Company of Kansas are hereby authorized to construct a rail road and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the rail road and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas rail road before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said rail road through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one hundredth meridian of longitude, that the several rail roads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, pro-

vided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley, to the aforesaid point on the one hundredth meridian of longitude to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas Company may proceed to build said rail road to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. The Central Pacific Rail Road Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a rail road and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said rail road and telegraph line first mentioned, and to meet and connect with the first mentioned rail road and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

SEC. 10. *And be it further enacted*, That the said Company chartered by the State of Kansas shall complete the one hundred miles of their said road, commencing at the mouth of the Kansas river, as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Rail Road Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads respectively, said companies, or either of them, may unite upon equal terms with the first named company in constructing so

much of said rail road and telegraph line and branch rail roads and telegraph lines in this act hereinafter mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed on the same terms and conditions as provided in this act in relation to the said Union Pacific Rail Road Company. And the Hannibal and Saint Joseph Rail Road, the Pacific Rail Road Company of Missouri, and the first named Company or either of them, on filing their assent to this act as aforesaid, may unite upon equal terms, under this act, with the said Kansas Company, in constructing said rail road and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; and in case said first named company shall complete their line to the eastern boundary of California, before it is completed across said State by the Central Pacific Rail Road Company of California, said first named Company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until the said roads shall meet and connect, and the whole line of said rail road and telegraph is completed; and the Central Pacific Rail Road Company of California, after completing its road across said State, is authorized to continue the construction of said rail road and telegraph through the territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Rail Road Company, until said roads shall meet and connect, and the whole line of said rail road and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly

from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said rail road and telegraph.

SEC. 12. *And be it further enacted*, That whenever the route of said rail road shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of rail road and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio rail road; the whole line of said rail road and branches and telegraph shall be operated and used for all purposes of communication, travel and transporta-

tion, so far as the public and Government are concerned, as one connected continuous line; and the companies herein named in Missouri, Kansas and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said first mentioned line between the aforesaid point on the one hundredth meridian of longitude and western boundary of Nevada Territory whenever the same is required by said first-named, company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

SEC. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Rail Road Company of Missouri may extend its roads from Saint Joseph, *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the rail road and telegraph line first mentioned, and may for this purpose use any rail road charter which has been or may be granted by the legislature of Kansas: *Provided*, that if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from St. Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee and Western Rail Road Company of Kansas may construct their road from Leavenworth, to unite with the road through Kansas.

SEC. 14. *And be it further enacted*, that the said Union Pacific Rail Road Company is hereby authorizad and required to construct a single line of road and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said rail road and telegraph first mentioned; and the said Union Pacific Rail Road Company shall complete one hundred miles of the road and telegraph in this section provided for in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, that a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the Government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of rail road completed through Minnesota or Iowa to Sioux City, then the said Pacific Rail Road Company is hereby authorized and required to construct a rail road and telgraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch rail road and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Rail Road, said point of junction to be fixed by the President of the United States, not further west than the one hundredth meridian of longitude aforesaid, and on the same terms

and conditions as provided in this act for the construction of the Union Pacific Rail Road as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City rail road and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch rail road and telegraph hereinbefore mentioned.

SEC. 15. *And be it further enacted*, That any other rail road company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors and assigns, the same as if the words had been properly added thereto.

SEC. 16. *And be it further enacted*, That at any time after the passage of this act all of the rail road companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said rail road and branches and telegraph line, upon the terms and conditions provided in this act.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said rail road and telegraph line to be thereafter devoted

to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of rail road, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all said rail roads before mentioned, and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States; *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States Treasury, undelivered, until said road, and all parts thereof provided for in this act, are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the Treasury until the whole of the road provided for in this act is fully completed; and if the said road, or any part thereof, shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum

to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said rail road and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time having due regard for the rights of said companies named herein add to, alter, amend, or repeal this act.

SEC. 19. *And be it further enacted*, That the several rail road companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said rail road and branches as fast as said roads and braches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said rail road and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment, on the part of said rail road companies, of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of rail road herein contemplated, without prejudice to the rights of said rail road companies named herein.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth:

First. The names of the stockholders and their places of residence, so far as the same can be ascertained.

Second. The names and residences of the directors, and all other officers of the company.

Third. The amount of stock subscribed, and the amount thereof actually paid in.

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey.

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon.

Seventh. A statement of the expense of said road and its fixtures.

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof; which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved July 1, 1862.

Act of Congress Approved July 2, 1864 (13 U. S. Stat., 356).

CHAP. CCXVI.—AN ACT *To amend an Act entitled "An Act to aid in the construction of a Rail Road and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes," approved July first, eighteen hundred and sixty-two.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Rail Road Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act: "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby repealed.

SEC. 2. *And be it further enacted*, That the Union Pacific Rail Road Company shall cause books to be kept open to receive subscriptions to the capital stock of said company, (until the entire capital of one hundred millions of dollars shall be subscribed,) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and St. Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall,

at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the City of New York, or at such other transfer office as the company may establish.

SEC. 3. *And be it further enacted*, That the Union Pacific Rail Road Company, and all other companies provided for in this act and the act to which this is an amendment be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station houses, or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its roadbed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any

party to any judge of a court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owners thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained: but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the Territory or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of

any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad and may institute proceedings in manner described for the purpose of ascertaining the value of and acquiring a title to the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred. It shall be competent for the legal guardian of any infant or any other person under guardianship to agree with the proper company as to damages sustained by the reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting lieu thereof the word "twenty-five." And in the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And

any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvement as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, that the quantity thus exempted by the operation of this act and the act to which this is an amedment, shall not exceed 160 acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided*, also, that the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts;" approved July 2, 1862, and notice given thereof at the proper land office.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said rail road, and of filing the map of the same, and the time for the completion of that part of the rail roads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Rail Road Company of California shall be required to complete twenty-five miles of their said road in each year there-

after, and the whole to the State line within four years, and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this is amendatory; and the verified statement of the president of the California Company, required by said section four, shall be filed in the office of the United States surveyor general for the State of California, instead of being presented to the President of the United States; and the said surveyor general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said rail road and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed and such rail road and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said rail road company of California of any portion of not less than twenty consecutive miles of their said rail road and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting, after the words "United States," in the last clause, the words "and States intervening."

SEC. 7. *And be it further enacted*, That so much of

section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said rail roads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act, and the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said rail road, and of enabling the said company as early as practicable to commence the grading of said rail road in the region of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required *required* to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done. The remaining one-third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act. And no such bonds shall issue to the Union Pacific Rail Road Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said rail road from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road: *Provided*, That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific rail road at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific rail road on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Rail Road Company, the Central Pacific Rail

Road Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective rail road and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That if any of the rail road companies entitled to bonds of the United States or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act, issued or shall thereafter issue any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds, shall be granted, or permitted, as added to such outstanding, unsatisfied, or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been en-

titled: *And provided further*, That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the president and secretary of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the Secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior, and any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof, shall be punished as aforesaid; *Provided also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road, or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee, and Western Rail Road Company, now known as the Union Pacific Railroad Company, eastern division, shall build the rail road from the mouth of Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a rail road from the City of Leavenworth to unite with the main stem at or near the City of Lawrence; but to aid in the construction of said branch the said Company shall not be entitled to any bonds. And if the Union Pacific Rail Road Company shall not be proceeding in good faith to build the said rail road through the Territories when the Leavenworth, Pawnee, and Western Rail Road Company, now known as the Union Pacific Rail Road Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last named company may proceed

to make said road westward until it meets and connects with the Central Pacific Rail Road Company on the same line. And the said rail road from the mouth of Kansas river to the one hundredth meridian of longitude shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any person or company for the construction of any part of the main trunk line of said rail road west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management, and progress of the work: and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual traveling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

SEC. 14. *And be it further enacted*, That the next election for directors of said rail road shall be held on the first Wednesday of October next, at the office of said company in the City of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their offices for one year, and until their successors are qualified.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. And it shall not be lawful for the proprietors of any line of telegraph authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each effense, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in any court of the United States, or of any State or Territory of competent jurisdiction.

SEC. 16. *And be it further enacted*, That any two or more of the companies, authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the State or States in which the roads of such companies

may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies, respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated, respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case, upon the completion by such consolidated organization of the roads or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so

be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the goverment of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company, the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company. And in case any company authorized thereto, shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this

section, and to have all the benefits thereof, as fully and completely as are herein provided, touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof. It is further provided that, should the Central Pacific Rail Road Company of California complete their line to the eastern line of the State of California before the line of the Union Pacific Rail Road Company shall have been extended westward so as to meet the line of said first-named Company, said first-named Company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Rail Road Company.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of rail road shall be completed through the States of Iowa or Minnesota to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of rail road and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Rail Road from Omaha, or the Union Pacific Rail Road, as such company may select, and

on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of said Union and Pacific Rail Road and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Rail Road Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Rail Road Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch; *And provided further*, That if a rail road should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Rail Road within ten years from the passage of this act, then, and in that case, all of the rail road which shall have been constructed by said company shall be forfeited to and become the property of the United States.

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Rail Road Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend its road through the Territory of Nebraska from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practi-

cable route, with the main trunk of the Union Pacific Rail Road, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And for the purpose of enabling said Burlington and Missouri River Rail Road Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine shops, switches, side tracks, turn tables, and water stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Rail Road Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior within one year of the date of said acceptance,

when the said Secretary shall withdraw the lands embraced in this grant from market

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Rail Road Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid; and such examination, report and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and St. Joseph's Rail Road Company by the said last mentioned act, so far as the same may be applicable: *Provided*, That no Government bonds shall be issued to the said Burlington and Missouri River Rail Road Company to aid in the construction of said extension of its road; and provided further, that said extension shall be completed within the period of ten years from the passage of this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or party in interest as

the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office, for the prosecution of the survey of the public lands along the line of said road, and so from year to year, until the whole shall be completed, as provided under the provisions of this act.

SEC. 22. *And be it further enacted*, That Congress may at any time, alter, amend, or repeal this act.

Approved July 2, 1864.

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Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 48.

TOLTEC RANCH COMPANY,
Plaintiff in Error,

vs.

GEORGE COOK AND OTHERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Supplemental Brief in Behalf of Plaintiff in Error.

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Of Counsel for Plaintiff in Error.

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I.

The latest decision of this Court stating how a Federal question must be set up or claimed in the record in order to enable this Court to take jurisdiction under Section 709 of the United States Revised Statutes is the case of Home for Incurables vs. City of New York, 187 U. S., 155, 157, where it was said as follows:

> "In Parmelee v. Lawrence, 11 Wall., 36, 38, this court * * * said it was essential to our

jurisdiction in re-examining the judgment of the State court that the alleged conflict between the State law and the Constitution of the United States 'appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court,' or 'it must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it.' "

See, also,

Dewey vs. Des Moines, 173 U. S., 193.
Meyer vs. Richmond, 172 U. S., 82.

An examination of the record in case No. 48 shows that the requirements imposed by this Court have been fully complied with. Upon the trial the plaintiff introduced in evidence a patent from the United States for the land in question and, when the defendants at page 30 of the record undertook to introduce evidence as to adverse possession prior to the date of the patent, the plaintiff's counsel made the following objection which was overruled by the Court :

" We object as incompetent, immaterial and irrelevant. Under the issues in this case the statute of limitations is attempted to be set up herein against us and under the proof that has been introduced on behalf of the plaintiff, showing the issuance of a patent of the United States to the railroad company, bearing date the 20th of January, 1900, constitutes no defense ; and any proof of the occupancy prior to that date or at all, seeing that as much as seven years have not elapsed since the issuance of patent, it becomes wholly immaterial, and the defense attempted to be made herein, cannot prevail, as a matter of law."

Upon the appeal to the Supreme Court of Utah the following appears among the assignments of error at page 58 of the record :

> "4. The trial court erred in giving to the jury instructions number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and each and every of said instructions, in that in so doing, it held that the defense of adverse possession could be made out in favor of the defendants and each of them, notwithstanding the evidence showed a patent by the United States had been issued no longer ago than January, 1900, to the Central Pacific Railroad Company, the grantor of plaintiff's predecessors to and for said lands described in the complaint; and notwithstanding it nowhere appeared in the evidence when the lands in dispute had been surveyed by the United States Government."

The federal question was then considered by the Supreme Court of Utah as appears from the opinion of the Court at the bottom of page 60 of the record :

> "The next question for consideration is whether the statute of limitations can prevail as a bar to the action when it appears that the patent of the U. S. Government was not issued to the plaintiff until January 20, 1900."

The plaintiff in error has therefore complied with the rule of this Court. At the outset of the trial of the case the claim made by him appeared by his objection to the evidence offered by the defendant; then again in the instructions asked for and subsequently in the assignment of errors upon the appeal to the Supreme Court of Utah. The assertion of the claims in either of these ways would have been sufficient. In addition the question was necessarily involved in the

decision of the State Court and was in fact considered at length, as appears by the opinion printed in the record in case No. 49, at page 78.

This Court would therefore seem clearly to have jurisdiction of the case. It certainly took jurisdiction of the case in Gibson vs. Chouteau, 13 Wall., 92, which was a similar case brought to this Court from the State Court of Missouri under Section 709 of the Revised Statutes.

II.

The case of the Central Pacific Railroad Company vs. Nevada, 162 U. S., 512, does not seem to limit the doctrine of the cases of Railway Company vs. Prescott, 16 Wall., 603; Railway Company vs. McShane, 22 Wall., 444; Northern Pacific Railroad Company vs. Traill County, 115 U. S., 600; Ankeney vs. Clark, 148 U. S., 345; in its application to the proposition that the United States has a lien upon and interest in the lands granted to the railroad company under the Act of 1862 until the cost of surveying, selecting and conveying the same has been paid. The Nevada case held that the Act of Congress of July 10, 1886 (24 U. S. Stat., 143), had been enacted for the purpose of avoiding the difficulty created by the decision of the cases just referred to and provided that railroad lands should not be exempted from taxation on account of the lien of the United States for surveying, etc. In other words, the Nevada case seems to emphasize the fact that the Government of the United States has an interest in and lien upon the lands in question until

the cost of surveying, etc., has been paid. This lien was in no way affected by the statute referred to in the Nevada case, except that it was not permitted to prevent State taxation of railroad lands. There is no statute providing that in spite of this lien of the United States upon the land in question a private party can obtain title thereto by adverse possession. If the Government continued to have an interest in the lands until the cost of surveying, etc., was paid, then it would seem that in the absence of a statute so providing no private individual could obtain any title to the land by adverse possession. The extent of the interest of the Government in the land is of no importance. The question is, did the Government have any interest in the land? If so, then the general principle declared by this Court in the cases of Redfield vs. Parks, 132 U. S., 239; Gibson vs. Chouteau, 13 Wall., 92; Bagnell vs. Broderick, 13 Pet., 436, that the title to public lands granted to a railroad cannot be acquired by an individual by adverse possession except by possession for the required length of time after the patent is issued by the Government for the land, would seem to control in this case.

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